International Union of Bricklayers & Allied Craftsmen, AFL–CIO *and* Sesco, Inc. and Architectural and Ornamental Iron Workers Union, Local No. 63, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO and Bridge, Structural and Reinforcing Iron Workers, Local No. 1, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 13–CD–436

June 14, 1991

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on February 1, 1991, by the Employer, alleging that the Respondent Bricklayers violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to continue to assign certain work to employees it represents rather than to employees represented by Iron Workers Local 63 and Local 1. The hearing was held on February 19, 1991, before Hearing Officer Mary Ellen Larson. The Employer and Bricklayers filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Sesco, Inc., an Ohio corporation, is a construction contracting firm engaged in the installation of exterior stone facades. Its principal office is located in Dayton, Ohio, from which it annually provides goods and services valued in excess of $50,000 directly to points outside the State of Ohio. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Bricklayers International, Iron Workers Local 63, and Iron Workers Local 1 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In November 1990, general contractor Morse-Diesel International engaged the Employer as a subcontractor responsible for the installation of exterior stonework in the construction of the Heller International building, a high-rise commercial building located at 500 West Monroe, Chicago, Illinois. The stonework installation involved utilizing the Sesco unistrut system, a variation of the Ziebell system of using steel ''unistrut'' bars, adjustable clips, bolts, anchors, and locking nuts to attach precut granite slabs to the building's steel skeleton.

On about January 25, 1991,[1] Bricklayers Local 21 President Joe Lozich received notice from the Joint Conference Board of the Construction Employers' Association and the Chicago and Cook County Building and Construction Trades Council (Joint Conference Board) that Iron Workers Locals 63 and 1 had filed a claim to certain work being performed by the Employer on the Heller International building project. Specifically, the Iron Workers claimed the unloading, handling, stockpiling, hoisting, and installation of relief angles to support stone and of multipurpose supports. This work had been assigned by the Employer to its employees represented by Bricklayers. The Employer does not employ ironworkers.

On about January 29, the Employer's project coordinator, John Steckling, received a telephone call from Bricklayers International Executive Vice President John Flynn. Flynn stated that the Iron Workers were claiming some of the work on the project at 500 West Monroe and threatened that Bricklayers would picket the jobsite if the Employer took any of the work away from the employees represented by Bricklayers. Flynn reiterated the threat to picket in a January 31 letter to the Employer's president, John Malcolm. On February 6, the Joint Conference Board issued a decision in favor of the Iron Workers. The Employer did not acquiesce in that decision.

B. *Work in Dispute*

The work in dispute involves the erection, anchoring, and aligning of exterior stonework, including but not limited to unloading, handling, stockpiling, hoisting, and installation of relief angles to support stone and of multipurpose supports, at the Heller International building project, 500 West Monroe Street, Chicago, Illinois.

C. *Contentions of the Parties*

The Employer and Bricklayers contend that: there is reasonable cause to believe that Bricklayers violated Section 8(b)(4)(D) of the Act; no voluntary means exists for adjustment of the jurisdictional dispute; and the work in dispute should be awarded to employees represented by Bricklayers based on the factors of its collective-bargaining agreement with the Employer, the Employer's preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

[1] All dates are in 1991, unless otherwise indicated.

Although afforded notice and opportunity to appear at the hearing, neither Iron Workers Local 63 nor Iron Workers Local 1 made an appearance. Further, neither union filed a posthearing brief. Consequently, these Unions have made no contentions before the Board with respect to the work in dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute. It is uncontroverted that Bricklayers' vice president, Flynn, twice threatened to picket the Employer if it reassigned the work in dispute to employees represented by Iron Workers. It is also undisputed that Iron Workers Locals 63 and 1 sought reassignment of the work in dispute by filing claims with the Joint Conference Board. Finally, although the Joint Conference Board issued a decision in favor of the Iron Workers' claim, it is undisputed that neither Sesco nor the Bricklayers International are members of the Joint Conference Board or bound by decisions of that entity.

Based on the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

D. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Collective-bargaining agreements

The Employer and Bricklayers have a collective-bargaining agreement effective from June 14, 1988 to June 14, 1991. Article II of this agreement is entitled ''Scope, Work Assignments, Manpower, Training.'' It refers specifically, inter alia, to work assignments involving the work in dispute. The Employer does not have a collective-bargaining agreement with the Iron Workers.[2] We find that this factor favors an award to employees represented by Bricklayers.

2. Company preference and past practice

The Employer prefers that the work in dispute be performed by employees represented by Bricklayers. The Employer has consistently assigned exterior stonework involving the work in dispute to employees represented by Bricklayers since 1972. We find that this factor favors an award to employees represented by Bricklayers.

3. Area and industry practice

Witnesses for the Employer and Bricklayers testified consistently that the practice of employers in the Chicago area and in the industry nationwide has been to assign the work in dispute to employees represented by Bricklayers. Bricklayers Local 21 President Lozich provided affidavits from five construction companies working in the area stating that they used bricklayers to do the type of construction at issue in this dispute. We find that the factor of area practice favors an award of the work in dispute to employees represented by Bricklayers.

4. Relative skills, efficiency, and economy of operation

Project Coordinator Steckling testified that the bricklayers who performed the disputed work had an average of five and a half years experience with stonework installation using the Employer's unistrut system. Ironworkers have no comparable experience or training. Further, the Employer does not currently employ ironworkers. If all or part of the work in dispute were assigned to employees represented by Iron Workers, the Employer would have to hire and train these employees.

Steckling also testified that both the quality and speed of the integrated unistrut installation process would be adversely affected if various phases of that process were divided between bricklayers and ironworkers. Employees represented by Bricklayers would have to let employees represented by Iron Workers perform support angle installations critical to the proper alignment of stone. If bricklayers subsequently determined that a finished wall section was not in plumb, they would be idled while ironworkers reset the angles and struts. In addition, ironworkers would have no other work when they were not performing the work in dispute. We find that this factor favors an award of the work in dispute to employees represented by Bricklayers.

[2] The Employer and Iron Workers did have one agreement limited to a construction jobsite which is not at issue in this proceeding.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Bricklayers are entitled to perform the work in dispute. We reach this conclusion by relying on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, efficiency, and economy of operations. In making this determination, we are awarding the work to employees represented by Bricklayers not to that Union or its members.

Scope of Award

The Employer and Bricklayers request that the Board issue a broad award covering all of the Employer's jobs in the Chicago area. They claim that such an award is necessary to avoid the recurrence of similar work disputes between Bricklayers and the Iron Workers.

We conclude that the issuance of a broad award would be inappropriate and we shall limit our determination to the particular controversy that prompted the instant proceeding. In this regard, we note that there are two prerequisites for a broad, areawide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the *charged party* has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute. *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670 (1985); *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144 (1980). In the present case Bricklayers, not Iron Workers, is the charged party. Because there is no showing of a proclivity of the charged party to engage in unlawful conduct to obtain work similar to the disputed work, we find insufficient grounds to issue a broad award, and we limit our determination accordingly.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Sesco, Inc. represented by International Union of Bricklayers & Allied Craftsmen, AFL–CIO, are entitled to perform the erection, anchoring and aligning of exterior stonework, including but not limited to unloading, handling, stockpiling, hoisting, and installation of relief angles to support stone and of multipurpose supports, at the Heller International building project, 500 West Monroe Street, Chicago, Illinois.

CHAIRMAN STEPHENS, concurring.

In my dissenting opinion in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), I stated that I would not find that the pursuit of an arguably meritorious grievance for the breach of a union signatory subcontracting clause constituted a claim for work assigned by a subcontractor who was the beneficiary of the arguable breach. So long as a union did nothing more than announce its intent to pursue such a grievance and actually pursued it through the proper channels, I would quash the 10(k) notice on the ground that there was no jurisdictional dispute because of the absence of competing claims.

It is essential under my *Slattery* position, however, that the grieving union establish that it had an arguably meritorious claim that the subcontracting of the work in question violated the signatory subcontracting clause in an agreement between that union and the employer who subcontracted the work. In the present case, the Employer and the Bricklayers have argued that the only agreement between the Employer and the Iron Workers was limited to a minor part of a project distinct from the one that is the focus of the dispute here. The Iron Workers made no appearance at the 10(k) hearing and filed no brief with the Board. The Iron Workers has therefore failed to establish that it was pursuing an arguably meritorious grievance. Accordingly, I agree with my colleagues that we are presented with a jurisdictional dispute. I further agree, for the reasons stated in the opinion for the majority, that the work should be awarded to employees represented by Bricklayers and that the award should be limited to the controversy that gave rise to this proceeding.